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No. 84-1529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

vs.

AMERICAN HOSPITAL ASSOCIATION, et al.

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF HON. ORRIN G. HATCH AND AUSTIN J. MURPHY, MEMBERS OF THE CONGRESS OF THE UNITED STATES, IN SUPPORT OF PETITIONER, MARGARET M. HECKLER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
NOTE	1
STATEMENT OF INTEREST	2
BRIEF AMICUS CURIAE NOTE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	
I. CONGRESS' INTENT IN PASSING THE CHILD ABUSE AMENDMENTS OF 1984 WAS TO ENSURE STATE INVOLVEMENT IN THE PROTECTION OF HANDICAPPED NEWBORNS WITHOUT LIMITING THE FEDERAL PROTECTIVE ROLE PURSUANT TO SECTION 504 OF THE REHABILITATION ACT OF 1973	4
A. Congress Perceived Discrimination Against Handicapped Newborns in Medical Treatment Decisions as a Serious Problem and It Enacted Significant Provisions of the Child Abuse Amendments of 1984 In Order to Involve the States in Addressing That Problem	4
B. Congress Intended That No Provision of the Child Abuse Amendments of 1984 Would Affect Any Right or Protection Afforded Handicapped Infants Under Section 504 of the Rehabilitation Act of 1973	8
1. Congress Expressed Its Intent That the Child Abuse Amendments of 1984 Have No Effect on Section 504 Rights In an Explicit Statutory Construction Provision	9

2. The Legislative History of the Child Abuse Amendments of 1984 Confirms Congress' Intent That the Amendments and Section 504 Be Viewed Separately 10

II. THE PRINCIPLES OF STATUTORY CONSTRUCTION PREVIOUSLY APPLIED BY THIS COURT SUPPORT THE CONCLUSION THAT THE CHILD ABUSE AMENDMENTS OF 1984 DO NOT EVINCE ANY CONGRESSIONAL INTENT TO LIMIT THE SCOPE OF SECTION 504 OF THE REHABILITATION ACT OF 1973 17

CONCLUSION 23

TABLE OF AUTHORITIES

Cases *Pages*

American Hospital Association v. Heckler, 585 F.Supp. 541 (S.D.N.Y. 1984) 19

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 18

Heckler v. American Hospital Association, Nos. 84-6211, 84-6213 (2d Cir. Dec. 27, 1984) 19

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) . 20, 21

Pipefitters v. United States, 407 U.S. 385 (1972) 17

Sioux Tribe v. United States, 316 U.S. 317 (1941) ... 17

United States v. Borden Co., 308 U.S. 188 (1939) 19

United States v. University Hospital, 575 F.Supp. 607 (E.D.N.Y. 1983), *aff'd.*, 729 F.2d 144 (2d. Cir. 1984) 8, 18

Statutes

Child Abuse Amendments of 1984, Pub. L. 98-457, tit. I, secs. 121-28, 98 Stat. 1749 (codified at 42 U.S.C. §§ 5101 to 5103 ..... *passim*

Civil Rights Act of 1968, tit. VIII, Pub. L. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §3601 *et seq.*) 20, 21

Rehabilitation Act of 1973, §504, 29 U.S.C. §794 *passim*

Securities Exchange Act of 1934, 48 Stat. 881 (codified as amended at 15 U.S.C. §78a *et seq.*) 18

42 U.S.C. §1982 ..... 20, 21

Legislative History

128 CONG.REC. H1489-90 (daily ed. April 20, 1982) . 5

128 CONG.REC. E2490 (daily ed. May 26, 1982) 5

HOUSE COMM. ON EDUCATION AND LABOR, CHILD ABUSE AMENDMENTS OF 1983, H. REP. NO. 159, 98th Cong., 1st Sess. (1983) 6, 10, 11

CHILD ABUSE PREVENTION AND TREATMENT AND ADOPTION REFORM ACT AMENDMENTS OF 1983: HEARINGS BEFORE THE SUBCOMM. ON FAMILY AND HUMAN SERVICES OF THE SENATE COMM. ON LABOR AND HUMAN RESOURCES, 98th Cong., 1st Sess. (1983) 6

SENATE COMM. ON LABOR AND HUMAN RESOURCES, CHILD ABUSE PREVENTION AND TREATMENT AND ADOPTION REFORM ACT AMENDMENTS OF 1983, S. REP. NO. 246, 98th Cong., 1st Sess. (1983) 6, 7, 14

130 CONG.REC. H379-82, H396 (daily ed. Feb. 2, 1984) 11, 12, 13

130 CONG.REC. S8951-56 (daily ed. June 29, 1984 .. 6, 14, 15

CONFERENCE REPORT, CHILD ABUSE AMENDMENTS OF 1984, H. REP. NO. 1038, 98th Cong., 2d Sess. (1984) 16

130 CONG.REC. S12,392 (daily ed. Sept. 28, 1984) 16

Administrative and Executive Materials

Interim Final Rules, 48 Fed.Reg. 9630 (1983) 5

Final Rules, 49 Fed.Reg. 1622 (1984) ..... *passim*

Miscellaneous

Brief for Amicus Curiae American Academy of Pediatrics in Opposition to a Petition for Writ of Certiorari, herein 8

Brief Amicus Curiae of Carlton Johnson, herein 22

Brief of the Respondents American Medical Association, et al., in Opposition, herein 8

Editorial, *The Bloomington Baby*, Washington Post, April 18, 1982, at 23 5

Editorial, *"Private" Death*, N. Y. Times, April 27, 1982, at A22 5

Petition for Writ of Certiorari, *Infant Doe v. Bloomington Hospital*, No. 83-437, *cert. denied*, 104 S.Ct. 394 (1983) 5

Respondents' [American Hospital Association, *et al.*] Brief in Opposition to Petition for Writ of Certiorari, herein 7, 8

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NOTE

This Brief Amicus Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed herewith with the Clerk of this Court.

STATEMENT OF INTEREST

The amici are members of the Congress of the United States who took an active role in formulating and sponsoring the Child Abuse Prevention and Treatment and Adoption Reform Act Amendments of 1984 (hereinafter Child Abuse Amendments of 1984). Senator Orrin G. Hatch is the Chairman of the Senate Committee on Labor and Human Resources in which the bill was considered and amended before being recommended to the full Senate. In addition, Senator Hatch was the principle co-sponsor of consensus amendments negotiated and fully supported by a wide range of disability rights, right to life, medical and hospital groups which were incorporated into the Senate bill and adopted by Congress. Representative Austin J. Murphy was Chairman of the Subcommittee on Select Education of the House Committee on Education and Labor, which considered and amended the Child Abuse Amendments of 1984 before presenting them to the House, and was the principle House sponsor of the bill and proposed amendments to the bill on the floor which were adopted in the House. Senator Hatch and Representative Murphy were also members of the Joint Conference Committee which resolved the differences between the House and Senate versions of the bill and recommended the compromise bill which was ultimately passed by both bodies.

The amici are aware that an argument has been made before this Court that, because Congress provided for state protection of handicapped infants in the Child Abuse Amendments of 1984, Congress impliedly acquiesced in the lower courts' determination that Section 504 of the Rehabilitation Act of 1973 (hereinafter Section 504) was not intended to encompass medical treatment decisions for handicapped newborns and instead expressed its intent to approach the problem solely through state mechanisms. Because this argument misperceives the clear intent of Congress in the enactment of the Child Abuse Amend-

ments of 1984, the amici offer this brief to reaffirm Congressional intent that the passage of the Child Abuse Amendments of 1984 have no effect on any right or protection of disabled infants under Section 504.

BRIEF AMICUS CURIAE

NOTE

The Questions Presented and The Statement of the Case are omitted from this Amicus Curiae Brief since they are amply stated in the Appellant's Brief of Margaret M. Heckler.

SUMMARY OF ARGUMENT

The Bloomington, Indiana "Infant Doe" case abruptly brought to public awareness the problem of discrimination against severely disabled newborns in medical treatment decisions. The Department of Health and Human Services promptly took steps to implement a nondiscrimination policy under Section 504 of the Rehabilitation Act of 1973. At the same time, Congress considered legislation which would require states to implement federal policy protective of disabled newborns through state child abuse agencies. Congress' action culminated in the Child Abuse Amendments of 1984.

Aware of the controversy surrounding the HHS regulations under Section 504, Congress included in the Child Abuse Amendments a statutory construction provision clearly stating Congressional intent that the Child Abuse Amendments were not to be construed as affecting the federal protective role pursuant to Section 504. The legislative history of the provision indicates that Congress' intent on this point was unambiguous and consistent. Regardless, Respondents in the present case have argued to this Court that passage of the Child Abuse Amendments evinced Congressional intent to ratify the lower federal courts' interpretation of Section 504 and to prescribe a

limited federal role in the protection of disabled infants. The argument is contrary to Congress' clearly expressed intention.

Moreover, the circumstances surrounding the passage of the Child Abuse Amendments of 1984 do not warrant an inference of Congressional ratification of judicial decisions construing Section 504. A fair examination of the Amendments themselves indicates that their scope is separate from and complementary to Section 504. This Court's decisions have shown that a deferential and cautious approach is required when the judiciary attempts to ascertain from subsequent conduct Congress' intent with regard to prior legislation. The contrary approach urged by Respondents would irrevocably shift the balance of power away from Congress to the lower federal courts.

ARGUMENT

I

CONGRESS' INTENT IN PASSING THE CHILD ABUSE AMENDMENTS OF 1984 WAS TO ENSURE STATE INVOLVEMENT IN THE PROTECTION OF HANDICAPPED NEWBORNS WITHOUT LIMITING THE FEDERAL PROTECTIVE ROLE PURSUANT TO SECTION 504 OF THE REHABILITATION ACT OF 1973.

A. Congress Perceived Discrimination Against Handicapped Newborns in Medical Treatment Decisions as a Serious Problem and It Enacted Significant Provisions of the Child Abuse Amendents of 1984 In Order to Involve the States in Addressing That Problem.

On April 9, 1982, a child was born in Bloomington, Indiana with Down's Syndrome and a surgically correctable esophageal blockage which prevented food ingestion. The parents and their obstetrician decided to withhold beneficial surgery as well as intravenous feeding from the

child because of the child's prospects for mental retardation. Six days later, the child, known as Infant Doe, died of starvation and dehydration, despite attempts to obtain a court order for treatment.[1]

The death of Infant Doe resulted in considerable press and Congressional attention, much of it critical of the denial of treatment. See Editorial, *The Bloomington Baby*, Washington Post, April 18, 1982, at 23; Editorial, *"Private" Death*, N. Y. Times, April 27, 1982, at A22; 128 *Cong.Rec.* H1489-90 (daily ed. April 20, 1982) (statement of Rep. Hyde). On April 30, 1982, President Reagan sent a memorandum to the Attorney General and the Secretary of Health and Human Services (HHS) citing the *Infant Doe* case, noting federal law prohibits discrimination against the handicapped and requiring the Secretary and Attorney General to take action to avoid a reoccurrence of the *Infant Doe* incident. *See* 48 Fed.Reg. 9630 (1983). This Presidential directive set into motion a series of events which resulted in the promulgation by HHS of the Final Rules under Section 504, 49 Fed.Reg. 1622 (1984), which are the subject of this appeal.

While the executive branch of the United States government was reacting to the public outcry over Baby Doe and putting into place specific federal protection for disabled infants under Section 504, Congress was considering its response. On May 26, 1982, Representative John Erlenborn introduced H.R. 6492, a bill to amend the Child Abuse Prevention and Treatment Act to protect handicapped infants "against attempts to cause their death through denial of nutritional sustenance or medical treatment routinely provided to other handicapped or non-handicapped individuals." 128 CONG.REC. E2490 (daily ed. May 26, 1982) (Remarks of Rep. Erlenborn). On March 3,

[1] For a full recitation of the facts of the case of Infant Doe and the efforts made to obtain a court order for treatment, *see* Petition for Writ of Certiorari, *Infant Doe v. Bloomington Hospital*, No. 83-437, *cert. denied*, 104 S.Ct. 394 (1983).

1983, in the 98th Congress, Rep. Murphy, amicus curiae herein, introduced H.R. 1904, which served as the genesis for a series of Congressional hearings followed by committee and floor action which culminated in the Child Abuse Amendments of 1984. Pub.L. 98-457, tit. I, secs. 121-28, 98 Stat. 1749 (codified at 42 U.S.C. §§ 5101 to 5103. The final version of the Child Abuse Amendments of 1984 was hammered out in marathon negotiations in the spring and summer of 1984 among representatives of disability groups, medical and hospital associations, right to life organizations, and a bipartisan group of Senators whose views span the ideological spectrum. *See* 130 CONG.REC. S8952-53, 8955-56 (daily ed. June 29, 1984) (remarks of Senators Hatch, Cranston, Dodd, Denton, and Nickles). On October 9, 1984, President Reagan signed the bill into law to take effect on the same date in 1985.

Both Congressional committees which considered the Child Abuse Amendments of 1984 were concerned about the reported incidents of handicapped infants being "denied medical treatment for life-threatening conditions, whereas infants who are not handicapped, but do have similar life-threatening conditions have received medical treatment," and intended to ensure by these provisions that "these infants are not denied medically indicated treatment due to their handicap." HOUSE COMM. ON EDUCATION AND LABOR, CHILD ABUSE AMENDMENTS OF 1983, H. REP. NO. 159, 98th Cong., 1st Sess. 2 (1983); SENATE COMM. ON LABOR AND HUMAN RESOURCES, CHILD ABUSE PREVENTION AND TREATMENT AND ADOPTION REFORM ACT AMENDMENTS OF 1983, S.REP.NO. 246, 98th Cong., 1st Sess. 16 (1983). As a result of hearings on the bill, CHILD ABUSE PREVENTION AND TREATMENT AND ADOPTION REFORM ACT AMENDMENTS OF 1983: HEARINGS BEFORE THE SUBCOMM. ON FAMILY AND HUMAN SERVICES OF THE SENATE COMM. ON LABOR AND HUMAN RESOURCES, 98th Cong., 1st Sess. (1983), the Senate Committee found that the inappropriate denial of medical care to infants on the basis of handicap was not limited "to one or two instances." SENATE REPORT,

at 16. All witnesses before the Senate Subcommittee agreed that "there is a sufficient body of evidence that such cases do occur and that it is an issue that needs greater scrutiny and remedial action." *Id.* at 11. As a result of these findings, the Senate Committee concluded that, if physicians are acting upon their convictions as reported in several surveys of physicians and as exemplified by highly publicized cases, "then federal policy on the civil rights of handicapped persons, is being contravened." *Id.* at 9.

Spurred by its findings of discriminatory denial of beneficial medical care to disabled infants, Congress included significant provisions in the Child Abuse Amendments of 1984 to involve the states in protecting handicapped infants in need of medical treatment.[2] In general, the Act now requires states that receive federal funds for their child abuse and neglect agencies to regard withholding of medically indicated treatment from disabled infants with life-threatening conditions as a form of child neglect. States must require prompt notification of suspected instances of such withholdings by individuals designated by each health care facility, and provide for the pursuit of legal remedies by state child protective service agencies as needed to prevent such withholding. The Act establishes grants to improve the provision of services for disabled infants with life-threatening conditions and for national and regional clearinghouses to provide current information about medical and community resources to assist such children. It requires HHS to issue regulations to implement the Act and to publish model guidelines (with no mandatory force) for hospital based Infant Care Review Committees.

By specifically including disabled infants with life-threatening conditions as children to be protected by state child abuse agencies, Congress intended that state

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[2] The text of the Child Abuse Amendments of 1984 is set forth in the Appendix to Respondents' [American Hospital Association, *et al.*] Brief in Opposition to Petition for Writ of Certiorari, herein.

resources and expertise be marshalled to implement federal policy protective of handicapped newborns. There is no implication, however, that the specific state actions mandated by the Child Abuse Amendments of 1984 were intended to be the exclusive channels of federal protection for handicapped infants or that the Amendments were meant to undercut any effort under Section 504. Rather, a two-pronged approach to the discrimination problem can be seen: one prong uses state child protection mechanisms, and the other prong uses federal enforcement machinery directed at health care providers receiving federal financial aid.

B. Congress Intended That No Provision of the Child Abuse Amendments of 1984 Would Affect Any Right or Protection Afforded Handicapped Infants Under Section 504 of the Rehabilitation Act of 1973.

Respondents American Hospital Association and American Medical Association claim that the passage of the Child Abuse Amendments of 1985 was intended by Congress to "reject on policy grounds the direct federal role adopted solely by the Secretary in her 504 regulations." Brief of the Respondents American Medical Association, *et al.*, in Opposition at 26, herein. *See also* Respondents' [American Hospital Association, *et al.*] Brief in Opposition to Petition for Writ of Certiorari at 14-15, herein. In addition, Respondents AHA and AMA, as well as the Respondents' amicus curiae American Academy of Pediatrics, claim that the failure of Congress to amend Section 504 in light of the *University Hospital* case[3] and instead to pass the Child Abuse Amendments of 1984 "clearly addressed the question of what federal response was appropriate with respect to the tragic question of providing appropriate treatment to severely impaired newborns." AMA Brief at 26. *See also* AHA Brief at 14-15; Brief for Amicus Curiae American

[3] United States v. University Hospital, 575 F.Supp. 607 (E.D.N.Y. 1983) *aff'd.*, 729 F.2d 144 (2d Cir. 1984) (holding that Congress did not intend Section 504 to encompass medical treatment decisions).

Academy of Pediatrics in Opposition to a Petition for Writ of Certiorari at 16-17, herein.

The claim that the passage of the Child Abuse Amendments of 1984 demonstrates Congressional hostility toward protection of disabled infants under Section 504 is fundamentally erroneous. The statutory construction provision included in the Amendments and the legislative history of the Amendments evince an altogether different intent.

1. Congress Expressed Its Intent That the Child Abuse Amendments of 1984 Have No Effect On Section 504 Rights in an Explicit Statutory Construction Provision.

Congress was aware of the efforts of HHS to enforce regulations under Section 504 to protect disabled infants and of the pending federal court cases on the validity of the Section 504 regulations when it considered and adopted the Child Abuse Amendments of 1984. As a result, Congress sought to ensure that the passage of the Child Abuse Amendments of 1984 would not be construed as precluding federal protection of handicapped infants under Section 504 or as ratifying the *University Hospital* case. In an exercise of caution, Congress adopted, *as part of the Child Abuse Amendments of 1984 themselves*, the following provision on statutory construction:

> Sec. 127(a) No provision of this Act or any amendment made by this Act is intended to affect any right or protection under section 504 of the Rehabilitation Act of 1973.

Child Abuse Amendments of 1984, Pub. L. 98-457, tit. I, sec. 127(a). This provision emphatically and unambiguously states the intent of Congress in adopting the Amendments and precludes any construction of the Child

Abuse Amendments of 1984 as limiting or lessening any right of protection under Section 504 for disabled infants.[4]

2. The Legislative History of the Child Abuse Amendments of 1984 Confirms Congress' Intent That the Amendments and Section 504 Be Viewed Separately.

The legislative nistory of the Child Abuse Amendments of 1984 reflects a consistent intent of Congress to ensure that the passage of the Child Abuse Amendments of 1984 would not be interpreted to limit any right or protection for handicapped infants under Section 504.

The original amended bill was submitted to the full House on May 16, 1983, by the Committee on Education and Labor with the following provision on statutory construction:

> Sec. 8. No provision of this Act may be so construed as to limit or lessen any right or protection under Section 504 of the Rehabilitation Act of 1973.

HOUSE REPORT, *supra*, at 27. The House Committee report included an explanatory statement which explained the inclusion of this provision:

> [T]he Committee intends to have the Secretary of HHS provide technical assistance and training to encourage and assist the States in developing and implementing new procedures or improving present procedures to be followed by child protective service agencies ... and courts of competent jurisdiction for the purpose of insuring that the specified treatment in this Act (including services assured under the provisions of section 504 of the Rehabilitation Act of 1973)

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[4] Amici note that Respondents made reference to Section 127(a) of the Act only by reference in a footnote, AMA Brief, *supra*, at 26 n.26; AHA Brief, *supra*, at 15 n.9, while claiming that Congress intended to preclude federal protection under Section 504 when adopting the Child Abuse Amendments of 1984.

> is provided for infants at risk with life-threatening congenital impairments.

HOUSE REPORT, *supra*, at 3.

The intent of this provision and the interaction between the Child Abuse Amendments of 1984 and Section 504 were addressed during the February 2, 1984, House floor debate on the bill. Rep. Murphy, floor manager for the bill and amicus curiae herein, stated:

> Finally, the bill reaffirms the civil rights of all children to have an opportunity to live without fear of being denied the necessities of life. This includes section 504 of the Rehabilitation Act of 1973 which applies to handicapped persons.

130 CONG.REC. H379 (daily ed. Feb. 2, 1984). Representative Murphy also inserted into the record an article written by him to explain the bill, in which he said:

> The bill simply reaffirms two principles under current law.... The second reaffirmation concerns Section 504 civil rights as they apply to the infants. Withholding of treatment is not automatically acceptable simply because the child is handicapped. The child is protected the first second after birth through the last second of life. Again, the right to life traditionally outweighs anyone's interpretation of a minimally acceptable quality of life. Even the U.S. Commission on Civil Rights in its report, "Accommodating the Spectrum of Individual Abilities" (Clearing-house Publication 81), recently recognized such cases as involving violations of handicapped citizens' civil rights.

130 CONG.REC. H380 (daily ed. Feb. 2, 1984).

Representative John Erlenborn, a cosponsor of the bill, also rose to explain the major provisions of H.R. 1904. He emphasized:

> H.R. 1904, as reported, would —
>
> * * *

> Sixth, state unequivocally that "no provision in this act may be so construed as to limit or lessen any right or protection under section 504 of the Rehabilitation Act of 1973...."

130 CONG.REC. H381 (daily ed. Feb. 2, 1984). Representative Erlenborn went on to comment on the HHS regulations promulgated pursuant to Section 504 and to applaud the Secretary and the Department for their efforts in addressing the issue of medical treatment for handicapped infants. He then noted the susceptibility of such regulations to shifting interpretations by changing administrations, and commented:

> In my view, Congress has a clear and necessary responsibility to establish public policy by taking timely and appropriate legislative action. We cannot abrogate this responsibility by acquiescing to a body of regulations with which we may agree today. Our obligation goes well beyond that. We have a responsibility to participate actively in the development of difficult public policy by taking positive statutory or legislative action. I believe that H.R. 1904 represents such a timely and positive step forward to the end that the rights of severely handicapped infants are more fully protected. I firmly believe that H.R. 1904 will provide a complimentary statutory basis for the HHS regulatory initiative developed under section 504 of the Rehabilitation Act.

130 CONG.REC. H382 (daily ed. Feb. 2, 1984).

The point was made again by Representative Steve Bartlett, a member of the Subcommittee which amended and reported out the bill:

> The intent of the new Infant Doe in H.R. 1904 affirms simply and unequivocably that such infants are to be afforded the same right to live that is guaranteed to an individual of any age with or without a handicapping condition.

> These are rights and protections already guaranteed by section 504 of the Rehabilitation Act and other laws of this Nation and the 50 States.

130 CONG.REC. H382 (daily ed. Feb. 2, 1984).

Even those who sought to amend the bill to substantially weaken its protections understood that the Child Abuse Amendments of 1984 were not intended to limit protection under Section 504. In the course of his remarks supporting the Chandler Amendment (which was not adopted), Rep. Waxman stated:

> This amendment is not about the controversial regulations that have been much publicized at the Department of Health and Human Services that various medical and hospital and disability groups have been working on. Those regulations are based on a completely different statute. Those regulations are based on the Rehabilitation Act and make provisions that affect another section of the law.
>
> I do not mean to support or oppose regulations at this time. They will stand or fall on their own merits, but they are not before this House today.
>
> The Chandler amendment is also not an attempt to address the complicated issues of section 504 of the Rehabilitation Act. As you will note, H.R. 1904 contains clear language saying that this bill is not to be used to limit any protection of that act.
>
> The Chandler amendment does not amend that portion of H.R. 1904 and would not affect the legal status of section 504 in any way.

130 CONG.REC. H396 (daily ed. Feb. 2, 1984).

Thus, the House devoted considerable attention to the possible effect of the Child Abuse Amendments of 1984 on federal protection under Section 504. The House clearly intended that the Child Abuse Amendments not limit any protection under Section 504. In fact, the House perceived

the Amendments to be consistent with and complementary to the Section 504 regulations.

Similar consideration of the effect of the Child Abuse Amendments of 1984 on Section 504 is reflected in the Senate consideration of H.R. 1904. The original Senate bill, S. 1003, approved by the Committee on Labor and Human Resources, did not contain any statutory construction provision similar to Section 8 in the House bill. Even at that time, however, the report from the Committee on Labor and Human Resources, which accompanied the bill, informed the Senate that:

> No provision of S. 1003 may be so construed to limit or lessen any right or protection under Section 504 of the Rehabilitation Act of 1973.

SENATE REPORT, *supra*, at 17.

On June 29, 1984, Senator Hatch, amicus curiae herein, for himself and five other principal cosponsors, introduced an amendment to S. 1003. The amendment included the following revised language of the statutory construction provision which was eventually adopted by both Houses:

> Sec. 205. (a) No provision of this Act or any amendment made by this Act is intended to affect any right or protection under section 504 of the Rehabilitation Act of 1973.

130 CONG.REC. S8952 (daily ed. June 29, 1984). Accompanying the amendment was a "Joint Explanatory Statement by Principal Sponsors of Compromise Amendment Regarding Services and Treatment for Disabled Infants." The authors set forth the purpose of the statement:

> This explanatory statement is a product of the six principal sponsors of this compromise measure: Senators Hatch, Dodd, Denton, Cranston, Nickles, and Kassebaum. It is their intention that this statement serve in lieu of a Committee report on the compromise agreement and thus be the definitive legislative history in the Senate on it.

130 CONG.REC. S8953 (daily ed. June 29, 1984). This statement included a paragraph calling attention to and emphasizing the statutory construction provision:

> The amendment (in section 205) would provide that no provision of or any amendment made by the Act is intended to affect any right or protection under section 504 of the Rehabilitation Act of 1973.

130 CONG.REC. S8952 (daily ed. June 29, 1984).

As Senator Hatch explained on the Senate floor, the amendment was the product of detailed study and lengthy negotiations with numerous representatives of divergent views on the regulation of medical care decisions for handicapped newborns. The American Hospital Association, American Academy of Pediatrics, and the American Medical Association participated in the negotiations which led up to the consensus amendment. On June 19, 1984, the medical/hospital groups proposed a revision of the statutory construction provision of the House bill to provide that "no provision of the bill may be so construed as to *grant*, limit or lessen any right or protection under Section 504 of the Rehabilitation Act of 1973." The medical/hospital groups were concerned that the Child Abuse Amendments of 1984 would *reinforce* and *affirm* Congress' intent that disabled children were protected under Section 504. As a compromise in the negotiations, it was agreed that the Child Abuse Amendments of 1984 should be *neutral* on Section 504, and thus the final wording that no provision "is intended to affect any right or protection under Section 504" was agreed to. Senator Hatch listed for the Senate some nineteen medical, hospital, disability rights, and pro-life organizations among the participants at the negotiating table who joined in endorsing the proposed amendment. Included in that list is Respondent American Hospital Association and amicus curiae American Academy of Pediatrics, who now assert that Congress was hostile to Section 504 protection for disabled infants when it adopted the Child Abuse Amendments of 1984.

After passage of H.R. 1904 by the House and S. 1003 by the Senate, a Joint Conference Committee of both Houses met to resolve the differences in the House and Senate versions of the bill. The House receded from wording of the statutory construction provision and accepted the Senate version which was part of the Senate consensus amendment. CONFERENCE REPORT, CHILD ABUSE AMENDMENTS OF 1984, H. REP. NO. 1038, 98th Cong., 2d Sess. 25 (1984). On Sept. 26, 1984 and Sept. 28, 1984, the House and Senate respectively adopted the Conference Report. Before the adoption of the Conference Report by the Senate, a letter from Senators Hatch, Denton, Nickles, Kassebaum, Dodd and Cranston to Senator Weicker was entered in the record by Sen. Hatch to clarify Congressional intent behind the Child Abuse Amendments of 1984. The letter stated:

> S. 1003 was designed to address situations of withholding of medical treatment to disabled infants by relying upon existing state child protective services systems. Throughout the statutory language and accompanying explanatory material, we refer to authority under state law as the mechanism for pursuing legal remedies under our amendment. This legislation does not itself authorize direct federal involvement in individual cases.
>
> An important element of this compromise was that S. 1003 is neutral with regard to the on-going controversy over the applicability of a federal remedy to Baby Doe situations under section 504 of the Rehabilitation Act of 1973. This policy of neutrality is expressly set forth in section 205(a). . . .

130 CONG.REC. S12, 392 (daily ed. Sept. 28, 1984) (remarks of Sen. Hatch).

The amici take this opportunity to affirm the intent expressed in the legislative history that the Child Abuse

Amendments of 1984 be viewed independently of the Section 504 controversy.[5]

II

THE PRINCIPLES OF STATUTORY CONSTRUCTION PREVIOUSLY APPLIED BY THIS COURT SUPPORT THE CONCLUSION THAT THE CHILD ABUSE AMENDMENTS OF 1984 DO NOT EVINCE ANY CONGRESSIONAL INTENT TO LIMIT THE SCOPE OF SECTION 504 OF THE REHABILITATION ACT OF 1973.

The forthright legislative history of the Child Abuse Amendments of 1984 reveals that Congress deliberately refrained from addressing the scope of Section 504 in the child abuse legislation geared toward state action. Yet even apart from that history, your amici respectfully submit that logical principles of statutory construction applied by this Court would compel a conclusion that the Child Abuse Amendments of 1984 are not an expression of Congressional intent regarding the scope of Section 504.

The assertion by the Respondents herein that Congress intended the Child Abuse Amendments of 1984 to be its exclusive legislative action to protect handicapped infants appears to rest on the premise that, because Congress did not amend Section 504 but instead enacted a different piece of legislation dealing with the same subject as the Section 504 regulations in controversy, it was thereby acquiescing in the lower federal courts' determination that those regulations are outside the scope of Section 504 and invalid. The logic of this assertion is flawed in two respects.

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[5] The *amici* are cognizant of the respect paid by this Court to explanatory statements by members of a Committee reporting on a bill in Congress, as exemplified in *Sioux Tribe v. United States*, 316 U.S. 317, 329-30 (1941). There this Court said of a Senate Committee Report, which characterized as erroneous an interpretation of prior legislation, "[t]his statement by the Committee which reported the [prior Act], made within five years of its passage, is virtually conclusive as to the significance of that Act." Likewise, in *Pipefitters v. United States*, 407 U.S. 385, 409 (1972), this Court accorded "great weight" to the viewpoint of a sponsoring Senator concerning the scope of a bill, expressed during debate on the Senate floor.

First, your *amici* submit that the fact that Congress took no action during the few months following a lower court decision construing legislation cannot be interpreted as Congressional ratification of that court's interpretation. A lower court's construction of legislation is not definitive, particularly in a controversial area where an appeal is virtually certain. Moreover, even if the lower court decision were regarded as significant, the slow pace of the legislative machinery nearly precludes any significant action in so short a time.

This Court considered whether Congress had acquiesced in judicial statutory construction in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). In that case, the plaintiff claimed standing as a potential purchaser of stock to bring a private damage action under § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 881. The federal courts had previously ruled that Congress intended to extend protection under § 10(b) only to actual purchasers and sellers of securities. This Court found in an opinion by Justice Rehnquist that Congress had ratified the federal courts' limiting interpretation, but only after noting that the interpretation had been consistently applied for over twenty years and that Congress had rejected two attempts to amend § 10(b) to expand its scope.

In the instant case, when the House adopted its version of the Child Abuse Amendments of 1984 on February 2, 1984, the only lower federal court decision on the applicability of Section 504 to disabled infants was found in *United States v. University Hospital*, 575 F. Supp. 607 (E.D.N.Y. 1983), where the District Court, on November 17, 1983, had denied HHS's demand for the hospital records of Baby Jane Doe. That decision was on appeal. Between House passage of H.R. 1904 and its adoption by Congress, the Second Circuit Court of Appeals affirmed the District Court in *United States v. University Hospital*, 729 F.2d 144 (1984),

and the District Court herein had enjoined the Section 504 regulations. *American Hospital Association v. Heckler*, 585 F.Supp. 541 (S.D.N.Y. 1984). The Second Circuit decision on the Section 504 regulations was not handed down until *after the Child Abuse Amendments of 1984 were signed into law. Heckler v. American Hospital Association*, No. 84-6211 (2d Cir., Dec. 27, 1984). Thus, there were only eleven months, one court of appeals decision, and no unsuccessful attempts to amend Section 504 regarding this matter, between the first judicial construction of Section 504 and the passage of the Child Abuse Amendments of 1984. In addition, the matter was still being actively litigated in the federal courts. No reasonable construction of Congressional intent would equate this history with Congressional acquiescence in the judicial construction of Section 504.

Second, the fact that Congress has enacted a separate piece of legislation touching upon the same subject as prior legislation does not support an inference that Congress deems the prior legislation no longer applicable. This Court has unequivocably stated otherwise:

> It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal "must be clear and manifest." It is not sufficient "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."

United States v. Borden Co., 308 U.S. 188, 198-99 (1939) (citations omitted).

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court considered the bearing of Congressional passage of the Fair Housing Title of the Civil Rights Act of 1968, Pub.L. 90-284, 82 Stat. 81, on the intended scope of 42 U.S.C. § 1982. The posture of that case in terms of the question of Congressional intent was remarkably similar to the present case. The old law, § 1982, extended general protection against racial discrimination in the sale and rental of property; the new Civil Rights Act provided in detail for federal machinery for the enforcement of such rights. In addition, the new Act contained a provision, § 815, which provided that "(n)othing in this title shall be construed to invalidate or limit any law of ... any ... jurisdiction in which this title shall be effective, that grants, guarantees, or protects the ... rights ... granted by this title...." The legislative history of the new Act, examined closely by the Court, showed that Congress was aware that a decision on the scope of § 1982 was pending before this Court, and that the scope might well be as broad as the petitioners there urged. The Court noted:

> On April 10, 1968, Representative Kelly of New York focused the attention of the House upon the present case and its possible significance. She described the background of this litigation, recited the text of § 1982, and then added:
>
> > "When the Attorney General was asked in court about the effect of the old law [§ 1982] as compared with the pending litigation which is being considered on the House floor today, he said that the scope was somewhat different, the remedies and procedures were different, and that the new law was still quite necessary."
>
> Later the same day, the House passed the Civil Rights Act of 1968. Its enactment had no effect upon § 1982 and no effect upon this litigation, but it underscored the vast differences between, on the one hand, a general statute applicable only to racial discrimina-

> tion in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.

392 U.S. at 416-17 (footnotes omitted). The Court also confirmed the Attorney General's view that the two statutes "stand independently":

> The Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute.

Id. at 416 n. 20.

Just as the Civil Rights Act of 1968 was found to enhance the protection of § 1982, the "Baby Doe" provisions of the Child Abuse Amendments of 1984 can only be seen as complementary to and consistent with Section 504, and not as a declaration that no rights under Section 504 exist. Here also, "the scope [is] somewhat different, the remedies and procedures [are] different, and ... the new law [is] still quite necessary." *Id.* at 416.

Some of the limitations of the Child Abuse Amendments of 1984 underscore the difference in scope between that Act and Section 504. First, the Child Abuse Amendments of 1984 only involve protection under state child abuse laws, while Section 504 involves substantial federal substantive law protection as well as federal enforcement machinery. Second, several states do not receive child abuse grants and thus need not comply with the Act and regulations while Section 504 applies to every recipient of federal financial assistance. Third, only child abuse agencies are required to act to protect disabled infants in these circumstances. Under Section 504, however, both the federal government and parents, who are often also victims of physician dis-

crimination in this area[6], are authorized to bring an action to protect their child. Fourth, the Child Abuse Amendments of 1984 only protect the rights of a child then alive and in need of medical treatment. If the child is dead or so debilitated by medical neglect that medical treatment is no longer beneficial, the Child Abuse Amendments of 1984 provide no remedy for the child or his parents — only termination of federal funds to the child abuse and neglect agency. In contrast, Section 504 allows a private damage action to compensate victims of discrimination. Fifth, the Child Abuse Amendments of 1984 deal with denial of treatment only on a case by case basis, and are ineffective against an institutionally adopted policy of discrimination. Section 504, however, may be enforced by injunctive actions which can protect a whole class of individuals from discrimination. Thus, no fair reading of the Child Abuse Amendments of 1984 would support the argument that Congress intended to preclude protection of disabled infants under Section 504.

In addition, giving effect to Respondents' argument that the enactment of the Child Abuse Amendments of 1984 indicated Congressional acquiescence in a lower federal court interpretation of Section 504 would unreasonably burden the Congress and would irrevocably change the balance between the judicial and legislative branches. Each time that Congress reconsiders a subject and legislates on it, all previous legislation on that subject would have to be reaffirmed. Congress would have to monitor every lower federal court decision and rush to amend federal law after each faulty lower court interpretation. These far-reaching and detrimental consequences would wreck havoc on the legislative function and irrevocably shift the balance of power away from Congress to the lower federal courts.

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[6] See *Brief Amicus Curiae of Carlton Johnson*, herein, for a detailed account of a child and his mother who were victims of discrimination by physicians regarding medical treatment.

CONCLUSION

A fair reading of the statutory construction provision of the Child Abuse Amendments of 1984, an examination of the legislative history of that provision, and an application of this Court's principles in determining Congressional intent regarding separate legislation on similar subject matter, all point to the fact that Congress intended that the Child Abuse Amendments of 1984 have no limiting effect on the Section 504 rights of handicapped newborns.

Respectfully submitted,

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